

June 27, 2005

Office of the Secretary
Federal Trade Commission
Room H-159 (Annex K)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Ladies and Gentlemen:

This letter is in response to the Commission's request for public comments regarding certain definitions and substantive provisions under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM or the Act) as set forth in the Notice of Proposed Rulemaking ("NPRM") dated May 12, 2005.

The American Resort Development Association ("ARDA") is the Washington, D.C. based professional association representing the vacation ownership and resort development industries. Established in 1969, ARDA today has nearly 1,000 members ranging from privately held firms to publicly traded companies and international corporations with interests in timeshare resorts, community development, fractional ownership and resort communities.

While the Commission requests input on several issues in the NPRM, ARDA has identified five key areas of concern to its members.

Time Required to Effectuate an Opt-Out Request

The Commission proposes to decrease the amount of time in which a sender must honor an opt-out request from ten days to three days. ARDA members do not support such a revision, but instead favor no change in the current requirement. The Commission should be applauded for its further attempts to stem the tide of unsolicited commercial email sent by those persons not otherwise complying with the requisites of the Act. However, ARDA members feel that this proposal, at a minimum, will not have the effect the Commission intends and in fact will only unnecessarily burden those who are attempting to comply with the Act in good faith.

A decrease in the time frame in which a sender must honor an opt-out request is likely to accomplish little in the way of decreasing the volume of unwanted, unsolicited commercial email messages that consumers currently receive. It seems unlikely that legitimate senders would email a consumer more than once or possibly twice every thirty days, let alone every ten days, and even less likely every three days, for fear of pushing the consumer to opt-out. Those senders who are not already complying with the provisions of the Act will still not comply. Thus, only legitimate senders are further burdened for no recognizable gain in privacy to the consumer.

The Commission recognizes that in some cases senders may be able to accomplish an automatic or nearly immediate honor of the opt-out request. Depending on the size and sophistication of the organization, this may be possible. However, given the number of contacts a large company may have with a customer, it is difficult to say with any certainty that a particular opt-out request could even be honored within the proposed three-day timeframe let alone instantaneously. A customer may provide an opt-out request through many avenues, regardless of the instructions provided in any email the consumer receives from the sender, including: over the phone, during a customer service call; in writing in response to a direct mail piece; in separate, unrelated correspondence; through a branch office; or through a third-party vendor.

If the sender uses an outside vendor to service its email communications or to host the server with the requisite data, the communication between the sender and its vendor with regard to the opt-out and the commercial email message may be delayed. Even in larger, more sophisticated companies, delays may occur in honoring an opt-out request company-wide if multiple departments contact consumers through email. Those senders who already strive to comply with the current provisions of the Act may be required to adjust or replace existing systems and software to account for the various methods of opting out and to communicate the customer's preferences in a more expedient manner, all at considerable expense.

In addressing previous comments submitted in favor of the existing opt-out period, or of lengthening that period, the Commission notes that few of those commenting provided any specific supporting data. Conversely, the Commission states that no factual evidence has been provided supporting the allegation that senders legally would be able to "mail bomb" consumers during the ten-day period or that "these practices would be eliminated by shortening the process."¹ In light of this lack of evidence for either position, maintaining the status quo would be more appropriate than swinging to one side or the other on this issue.

Finally, the Commission historically has expressed great concern with regard to the potential impact of new rules or amendments upon small businesses. Even without specific data, it should be readily apparent that any drastic change, such as one that decreases the time permitted to perform a critical function by a week, would negatively impact a small business. The proposed amendment in particular would be a challenge, as it would require some level of technical support, which may not be readily available to smaller operations. Thus, it would be appropriate and consistent for the Commission to recognize that there would be some negative impact on small businesses and that at least the Commission should refrain from changing the current opt-out honor period.

Accordingly, the Commission should not adopt the proposal to shorten the time period in which to honor a request to opt-out, but leave the requirement at ten days.

Expiration of Opt-Out Request

Unlike telephone numbers, there does not exist a national directory of email addresses, as the Commission states in the NPRM. Thus, there is no readily viable way to purge old addresses that are no longer in use. While the Commission believes that a sender's suppression list would not reach the volume of numbers on

¹ NPRM at 68. ARDA notes that the Commission does not appear to provide any statistical support for making a change in the time period or that such a change would achieve the desired result.

the National DNC Registry, it is important that the Commission note that the potential for consumers to have multiple email addresses is far greater than the potential for multiple telephone numbers. There are still many email providers that have free email access. Further, it is easier for a consumer to provide false information when obtaining an email address, and obtain several email addresses under different names, then when subscribing to telephone service. Thus, obtaining an email address is much easier and less costly than obtaining a telephone number. It is highly conceivable that an email suppression list could be considerably larger than a company's do not call list and increasingly more difficult to scan against mailing lists.

By establishing a reasonable expiration period for opt-out requests, the Commission would provide a way for senders to periodically clean out their databases of non-responsive addresses. This streamlining would make it less likely that senders would overlook an opt-out. As many consumers tend to have multiple addresses, the more frequent the expiration of an opt-out request, the more efficient the sender can be in handling opt-out requests for active email addresses. Thus, it should be incumbent upon the Commission to place a limit on the duration of an opt-out request. ARDA supports a limit of at least two years as has already been suggested in the NPRM.

Definition of "Sender"

ARDA supports the Commission's proposal to modify the definition of "sender" to permit multiple sellers advertising in a given email message to designate the sender for purposes of the Act. A "net impression" test, based on the elements identified in the NPRM (controls content, determines email addresses to which a message is sent, and is identified in the "from" line), would appear to be a viable option by which to determine the identity of the sender.

With regard to messages not involving potentially multiple senders, ARDA understands it is the Commission's position that a "sender" must meet both of the following criteria: "initiate a message and advertise one's own product."² This would apply to affiliates as well. Thus, if Company A sends a commercial email message to its customers which contains only advertising for Company B, an affiliate, and a recipient opts out, the opt-out applies only to Company B. Obviously, if the message were transactional or relationship in nature, i.e. with minimal commercial content, the opt-out requirement would not apply. Provided that this is correct, ARDA would not advocate further modification to the current definition, other than to provide sellers the ability to structure an email message so that only one party is considered a "sender" for purposes of the Act as noted above.

Sender Safe Harbor

If a message is sent by an affiliate or non-affiliated third party of a content provider, and the message violates the Act due to no fault of the content provider, the content provider should be afforded a safe harbor. The content provider would have to meet certain minimum requirements in order to take advantage of the safe harbor.

There is sufficient precedent for the Commission to adopt a safe harbor. The Telemarketing Sales Rule ("TSR") provides a safe harbor for telemarketers who make an errant call to a consumer on the National DNC Registry. The TSR safe harbor

² NPRM at 20.

contains several requirements a telemarketer must meet in order to take advantage of its protection. The Commission should construct a similar safe harbor under CAN-SPAM.

The suggested safe harbor under the CAN-SPAM regulations would not apply to a sender (the party delivering the email) that is not under the provider's control, but only to the provider, if the provider meets certain requirements. A safe harbor for a content provider should require the following:

- (1) the content provider is not the sender of the message;
- (2) the content provider has taken reasonable measures to comply with the CAN-SPAM law; and
- (3) if the sender is an unrelated third party, the content provider and sender have entered into a written agreement, which includes a provision prohibiting the sending party from violating the Act.

By meeting these criteria, there should be a rebuttable presumption of compliance by the content provider, if not complete freedom from liability for violations of the CAN-SPAM act by a sender who is not also the content provider.

Definition of "Transactional or Relationship Message"

With regard to messages negotiating a commercial transaction, ARDA believes it would be appropriate to categorize such messages as "transactional or relationship" rather than "commercial". Once discussions have begun and the parties are reviewing possible terms, a transactional relationship exists. There is no requirement for consideration to pass or an agreement to be signed in order for the parties to be involved in a transaction. Thus, any messages sent as part of a commercial transaction should not be required to meet the requisites of a "commercial" message.

Similarly, any message sent to inform a member or subscriber or other consumer with an ongoing relationship of enhancements or upgrades to a current product should be considered "transactional or relationship" in nature. But for the consumer's decision to enter into a relationship, the sender would not provide the recipient with this information.

Once again, ARDA thanks the Commission for this opportunity to voice its concerns with this proposed rule.

Sincerely,

Sandra Yartin DePoy
Vice President
Federal & Regulatory Affairs